DOCUMENT RESUME

ED 245 378 EA 016 927

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TITLE State Regulation of Educator Evaluation.
PUB DATE 83
NOTE 18p.; Chapter 7 of: Legal Issues in Public School Employment (EA 016 920).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Administrator Responsibility; Board of Education Policy; *Compliance (Legal); *Court Role; Elementary Secondary Education; Evaluation Criteria; Hearings; *Legal Responsibility; State Legislation; *State School District Relationship; *State Standards; Teacher Dismissal; *Teacher Evaluation; Teacher Supervision

ABSTRACT

This chapter examines the legal issues involved in state evaluation statutes as interpreted by the judiciary. The nature and purpose of state statutes governing evaluation are described, followed by a discussion of how these statutes relate to tenure laws, administrative regulations, board policy, and collective bargaining agreements. Next, statutory due process is defined, and the consequences for a school board of failure to provide due process are delineated. The rest of the chapter describes the court's role in public employment disputes, outlining the scope of judicial review and standards of compliance. Issues subject to judicial review include the significance of evaluation criteria, evaluator qualifications, the effect of political pressure on dismissal decisions, evaluator performance, administration of evaluations, remediability of employees behavior, and methods of evaluation. The chapter concludes with recommendations for the administration of evaluations in order to improve teaching and supervision and, if necessary, to substantiate demotion and dismissal decisions. (TE)

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State Regulation of Educator Evaluation

Laura Means Pope

Evaluation as a form of accountability is an important element in the employment relationship between school boards and professional staff. Many legal issues are involved in the evaluation procedure. During the 1970s statutes on public sector management accountability were added to more than half of the state education codes. This chapter will examine the legal issues involved in state evaluation statutes as interpreted by the judiciary.

The questions below provide the basis for the discussion that follows.

1. What are evaluation statutes? How do they relate to tenure laws, administrative regulations, board policy, and collective bargaining agreements?
2. What is statutory due process, and what are the consequences of failing to provide it?
3. What standards of judicial review apply? What degree of compliance is required? And what remedies do courts employ?
4. Who determines the evaluation criteria? Who should do the evaluating, for what purpose, and how often? And what evaluative instruments or processes are used?
5. When is professional performance or behavior considered remediable? When is a remediation period required? And what length of period is reasonable?

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In: Legal Issues in Public Employment.
Joseph Beckham and Perry A. Zirkel, Editors
Phi Delta Kappa, Bloomington, Indiana
1983

6. What pattern and content of evaluations are necessary to substantiate dismissal decisions?

The chapter concludes with recommendations for the administration of evaluations in order to improve teaching and supervision and, if necessary, to substantiate demotion or dismissal decisions.

Evaluation Statutes

Education is a state function authorized by the constitutions in all 50 states. Generally, state constitutions require state legislatures to establish a system of education. In some instances the constitution itself establishes part of that system. For example, in California the office of the superintendent of public instruction is established by the constitution.[1] Except in Hawaii, which is a single school district, all states provide a system of local school districts governed by locally elected or appointed boards of education, sometimes called school committees.

State statutes generally stipulate that certificated personnel have a right to employment after a probationary period, and they specify the reasons for demoting or dismissing persons with continuing contracts and the procedures that must be followed prior to making such decisions.[2] The purpose of such so-called tenure laws is "to assure teachers of experience and ability a continuous service and rehiring based upon merit rather than upon reasons that are political, partisan or capricious."[3]

During the 1970s management concepts stressing evaluation and accountability exerted increasing influence on education legislation. About half the states enacted evaluation statutes to "improve the quality of instructional, administrative, and supervisory services in the public schools,"[4] and to ensure uniformity of evaluation, at least within school districts.[5] This was a time when the deepening economic recession resulted in budget cuts, and declining enrollments led to teacher layoffs. By the mid-1970s and early 1980s, cases involving tenure and evaluation statutes and policies had burgeoned.

State statutes governing evaluation of educators vary widely in terms of form, content, length, and specificity. For example, the Iowa statute, in two sentences, requires boards of education to "establish evaluation criteria and implement evaluation procedures" and to "negotiate in good faith with respect to those procedures."[6] In contrast, the Kansas statute included everything from the legislative purpose to a penalty section.[7] Generally, the legislature requires local school boards to establish the evaluation criteria,[8] but some specify what is to be assessed. Alaska lists "teaching or administrative skills . . . interpersonal relationships with students, parents, peers and supervisors, as well as those additional factors which the school board considers relevant."[9] California includes "the

progress of students toward the established standards" and "maintenance of a suitable learning environment."[10]

Frequently, statutes require boards to consult with professional personnel in developing criteria.[11] Sometimes the task of developing criteria is assigned to professionals. Louisiana law requires the state superintendent of education to produce a comprehensive plan for an education accountability program including goals, procedures, and evaluation instruments.[12] Washington also assigns the duty to the state superintendent of schools but provides for legislative review of the initially set minimum criteria.[13]

Statutes regulating evaluation may be an integral part of the tenure laws,[14] or they may be created by separate acts and coded near tenure laws.[15] In some states evaluation is part of the statutory duties of superintendents or principals.[16] State board of education administrative regulations on evaluation may be as binding on local boards as statutes are.[17] Typically, the statutes or regulations specify the minimum frequency of evaluation. Under some statutes or regulations probationary teachers must be evaluated more often than tenured personnel;[18] but in others, such a status distinction is forbidden.[19] Many evaluation statutes apply to all certificated personnel, except in some instances the superintendent,[20] and a number expressly protect employee privacy.[21]

Tenure and Evaluation: An Administrator's Dilemma

Many evaluation statutes were enacted as a result of public pressure to legislate better education; but inevitably, all evaluation statutes and regulations become, in operation, integral to the fair dismissal or tenure laws. Taken together, tenure and evaluation statutes create an administrative dilemma. On the one hand, conscientious administrators who want to help employees improve must demonstrate faith in their ability to do so and must emphasize the positive aspects of their performance as well as identify their weaknesses. On the other hand, to improve the school system may require decisions adverse to the employee; and the administrator must document weaknesses and give express notice that, unless corrected, they may lead to nonrenewal, demotion, or dismissal. This is the administrator's dilemma: to do justice to both the person and the system in the interest of public education.

The Iowa Supreme Court addressed this dilemma recently when it affirmed a trial court's ruling that the evidence presented substantiated a school board's decision to terminate its contract with a tenured elementary principal with 14 years of service. The court's ruling on the case is interesting:

> Probably no inflexible "just cause" definition we could devise would be adequate to measure the myriad of situations which may surface in future

litigation. It is sufficient here to hold that in the context of teacher fault a "just cause" is one which directly or indirectly significantly and adversely affects what must be the ultimate goal of every school system: high quality education for the district's students. It relates to job performance including leadership and role model effectiveness. It must include the concept that a school district is not married to mediocrity but may dismiss personnel who are neither performing high quality work nor improving in performance. On the other hand, "just cause" cannot include reasons which are arbitrary, unfair, or generated out of some petty vendetta.[22]

Restrictions on the Power of School Boards

As prelude to discussing the significance of evaluation in the whole employment process, some consideration of school boards' power to make employment decisions is necessary. Today, boards may employ their relatives, loyal constituents, or lovers to teach, but only if they hold state certification. Boards may choose not to renew a teacher's contract without explanation, but only in the probationary years of service. Boards may fire educators during the term of their contracts, but only for a few very good reasons. Boards may transfer educators without their consent, but not if they agreed otherwise at the bargaining table. School boards have considerable power in employment decisions; but constitutions, statutes, state agency regulations, and negotiated contracts have been used to tame the exercise of that power. All these restraints are products of the belief that something simply is not fair.

School officials often feel hampered by the myriad laws and due process requirements. Superintendents and principals say, "I'm responsible for this operation, but I don't have the authority to do anything about it!" Fairness is at the heart of the matter, but people disagree about what is fair. Yet, if school officials approach all the rules and regulations as simply a consensus on what is deemed "fair," they can develop an approach to administration that is equitable to all and will be so recognized by individuals and institutions alike.

Our society tends to resolve disagreements about what is fair by first determining how the decision should be made and by whom, a resolution known in the law as due process. The U.S. Constitution enshrines this concept in the 14th Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[23]

These proscriptions have significant implications for administrators making employment decisions. Chapters 3 and 4 explore both substantive and procedural due process flowing from the U.S. Constitution. Since state constitutions generally contain the same or similar language as the 14th Amendment, this chapter discusses statutory due process, which is broadly defined here to include the procedural rights and cor-

relative duties prescribed by statute and administrative policy or regulation promulgated pursuant to statute.

Before a school board can make any employment decision adverse to the interests of an educator, it must follow the statutory procedures and state administrative regulations. To do otherwise risks reversal of the decision by an administrative agency and/or court.[24] Hundreds of suits challenging public school employment decisions form the case law interpreting statutory due process. School board members, superintendents, and taxpayer groups increasingly bemoan the high cost of such disputes. In three recent fiscal years the California Office of Administrative Hearings charged school districts $582,000 for 91 dismissal hearings in which school boards won 50 of the cases.[25]

In addition to statutory due process or public law restraints on school board discretion, collective bargaining agreements have the force of public law but are binding only to the parties involved. Some agreements prescribe particular procedures concerning evaluation or criteria for reduction-in-force decisions. A school board may not relinquish its duty to make employment decisions,[26] but neither can it act in ways contrary to a negotiated contract.[27] Both state agencies and courts can reinstate, at least temporarily, a dismissed teacher, even if nontenured, but the complainant must show that "the violation substantially and directly impaired his or her ability to improve himself or herself and attain continuing contract status."[28]

The Court's Role in Employment Decisions

At this point, a brief description of how courts view their role in public employment disputes may help the reader understand the outcomes.

Scope of Judicial Review. Courts uniformly reiterate that in the review of the administrative acts of a board of education they will not substitute their judgment for that of the board. One appellant argued before a federal district court that the board had denied him equal protection of the law when its policies and practices allowed teachers with less satisfactory evaluations than his to be appointed as permanent teachers. The court rejected the claim and declared: "The Board could properly refuse to renew plaintiff's contract without regard to the performance evaluation."[29] It further expressed its belief "that federal courts should not sit as 'super-Tenure Review Committees' when a plaintiff employs the 'I'm just as good as you are' argument."[30] The plaintiff lost because school administrators and the board had followed prescribed procedures and the board by law had the authority not to renew the contract, regardless of merit.

Had the school authorities failed to evaluate the plaintiff pursuant to

the evaluation statute, quite another balance would be struck, even without tenure involved. An appellate court in a California case, while eschewing interference with the merits of a nonrenewal decision, nonetheless held the board strictly accountable for compliance with the evaluation statute. Failure to meet announced notification deadlines and to provide the teacher with written evaluations prompted the court to grant review of the board's decision as the only means to enforce evaluation statutes in the absence of a statutory right to arbitration or judicial review of a nonrenewal decision.[31]

The West Virginia Supreme Court is typical in its strict construction of both tenure statutes and evaluation regulations in favor of employees. A state board of education policy requires "open and honest evaluation of [every employee's] performance on a regular basis."[32] In an appeal of a board's refusal to renew an elementary teacher's contract and to grant her a continuing contract of employment, the supreme court reinstated the teacher.[33] Both the state superintendent of schools and circuit court had affirmed the board's decision, but the supreme court viewing the events as a whole found that despite regular evaluation, the principal had failed to give the plaintiff evaluations that were "open and honest" enough to apprise her of how she was performing as a teacher. The court ruled that every decision involving competency under the statutes governing employment of teachers must be based on evaluations conducted pursuant to the state board of education policy and that both statute and policy would be strictly construed in favor of the employee. The evaluations met the form required but lacked the substance guaranteed.

If school authorities have followed the statutes and the employee knows about his deficiencies and has had opportunity and help to improve, the court will not substitute its judgment for the board's. One tenured teacher was dismissed for insubordination because, after 16 sessions on daily lesson plans with the principal, he refused to attend additional sessions. He lost his appeal of the dismissal for insubordination.[34] The Arizona appellate court rejected the charge that a scheme of harassment was set up to force him out of the system. Even though the teacher's charge had some substance, the court found that the daily meetings with the principal were a reasonable means of supervision, that holding them during preparation time created no unusual burden, and that the principal had noted improvement during those sessions.

Standards of Compliance. The courts nearly always require strict compliance with statutes governing dismissal of employees. Substantial compliance, on the other hand, has sufficed in at least one jurisdiction, the District of Columbia school system, which is governed by a code enacted by Congress. At the time of the events in question, the code prohibited discharge of any school employee "except upon written recommendation of the superintendent of schools."[35] Based on several communications

from the administrator of the district where the appellant worked, the superintendent of schools instructed the director of personnel to dismiss a community aide because of poor performance. The letter of dismissal notified the employee of the reason for the action and his right to a hearing. It also served as the superintendent's recommendation to the board, but was not actually signed by the superintendent. In a reversal of the superior court, the appellate court found no dereliction in duty nor improper delegation of power, because the superintendent had actually made the decision.[36] Compliance with the substance, if not the form, of the code sufficed.

Another federal court accepted substantial compliance as meeting the evaluation statute but required strict compliance with the tenure law. In that case a tenured teacher, dismissed as incompetent, appealed the board's decision and charged lack of due process and racial discrimination. Pursuant to Louisiana law, the board had adopted an evaluation policy providing that if "at any time during the evaluation process the teacher is charged with incompetence or willful neglect of duty, the evaluation procedure as implemented under [the evaluation statute] is superseded by the tenure statute."[37] The court found that the school authorities had substantially complied with the board's policy on evaluation and strictly complied with the tenure law, once the superintendent decided to recommend dismissal for incompetency and willful neglect of duty. The record showed multiple observations, post-observation consultations, specific recommendations for improvement, and warnings about unacceptable performance over a period of nearly two years. The only lack of compliance with board policy was the principal's failure to assist the teacher in establishing her personal goals for 1979-80. In this case both the board and the court viewed the evaluation and dismissal processes as distinctly separate and as calling for a different level of compliance in providing statutory due process. Even so, the substantial evidence that justified dismissal consisted primarily of the record of observations made pursuant to the evaluation statute. The evidence of fair treatment seems to be the key to understanding this case rather than the standard of compliance.

As the foregoing cases illustrate, the right to judicial review, the kind of review, and the standards of review and compliance depend on particular state statutes and case law.

The Significance of Criteria. Evaluation statutes frequently require professional educators to establish the criteria for evaluation or require boards of education to consult with professional staff before establishing them. Legislators, teacher unions, state boards of education, local school boards, superintendents and other administrators, and teaching staff have all contributed to the criteria currently in use. These criteria are crucial in determining the contours and quality of the educational enter-

prise. If used repeatedly, they serve as a powerful influence in the school system and in the lives of the professionals who strive to match performance to the criteria. They also temper the subjectivity of professional evaluation and ferret out unacceptable bias.

The absence of appropriate criteria on which to base evaluations can undermine the rationale used for employment decisions. For example, a trial court, in a recent suit challenging promotion policies as racially discriminatory in a district undergoing court-ordered desegregation, observed: "[T]he Board has not adopted any such non-racial objective criteria and, until this is done, the Court will never be in a position to adequately consider the propriety of any principal selection made by the Board."[38] The federal appellate court agreed that it was impossible for the defendant board to justify its selections for principal because it had no criteria on which to make its evaluations and decisions. The only objective evidence on record showed the black complainant to be "clearly superior" to the white principals selected for the positions he had sought. The court ordered the board to instate the complainant as a principal and to grant back pay based on the differential between his salary as a teacher and the salary he would have received as a principal.[39]

Compare the results of the above case with another board's decision to terminate the contract of a temporary teacher on the basis of unsatisfactory performance ratings. She successfully challenged the board's first attempt to dismiss her because of its faulty hearing procedure; there was no transcript of the proceeding, and the district presented no evidence. Almost two years later, the board followed mandated hearing procedures and again terminated her contract. This time the decision withstood legal attack, primarily because the main testimony supporting dismissal was based on proper evaluations. Both the superintendent and principal rated her performance a number of times and conferred with her in an effort to improve her performance. At the hearing, several teachers testified on her behalf, but the court held their testimony to be of less weight because they had not made actual classroom observations and "none had a certified qualification to evaluate another teacher."[40] The court upheld the board's action based on the supervisory ratings and on the fact that the plaintiff offered no evidence that the ratings or discharge resulted from "fraud, arbitrariness, or were contrary to law."[41]

Evaluator Qualifications. Judicial emphasis on the qualifications of the evaluator raises an interesting issue. Everybody feels qualified to make judgments about the schools. Whether professionals or the public represented by the board should make decisions concerning employment is a matter of long-standing tension. Statutes and case law embody the compromises. The school board makes the final decision on hiring, firing, assignment, and promotion, but under many laws only on recommendation of the superintendent.[42]

With respect to evaluations, state law may specify that evaluation of teachers is a duty of particular administrators or may simply declare that teachers are to be evaluated. In the latter case, state courts interpret the vague language to mean evaluation by persons trained and qualified to do so. The West Virginia state policy illustrates the point. The West Virginia Supreme Court has repeatedly ruled that if a board fails to follow the evaluation procedures in the state policy, it cannot discharge, demote, or transfer an employee for reasons having to do with prior misconduct or incompetency.[43] A trial court recently interpreted the proscription to mean that only the board could do the evaluating. The supreme court's reversal emphasized that school board members are generally not qualified to supervise the professional work of educators and that the law "clearly contemplates that professionally trained teachers, principals, and superintendents shall have exclusive control of these matters."[44]

Public Pressure in the Process. Political pressure frequently surfaces in dismissal decisions. Board members cannot ignore voters who urge firing someone, and this form of pressure permeates some cases. A classic one is the case of a wrestling coach whose team had a losing season. Soon after the booster club met with the principal, he confided in the coach that it looked as if either the coach, the superintendent, or the principal would have to go. Predictably, it was the teacher-coach who had to fight all the way to the state supreme court to keep his job. The court noted: "There was evidence, too, that [the coach] was simply the latest target of an overzealous booster club."[45]

Another case involved a tenured teacher who urged her fast-track students toward ever greater achievement. Some parents complained about the pace and her methods. All of her evaluations rated her performance "satisfactory," the highest possible rating. Without prior notice or a hearing the board terminated her contract when she refused to sign an individual plan for improvement. The agreement provided that any breach would result in immediate termination of her contract by the superintendent. A federal district court found that at the time she was advised that she could have an impartial hearing, the board had already made its decision, so such a hearing was impossible. The court ruled there was a violation of constitutional due process as well as of the substance of the tenure law. It ordered the board to reinstate the teacher and enjoined it from taking any action of any nature against the teacher based on an anything that led to her removal in the first place.[46]

In another case a tenured teacher, on the basis of two parental complaints, was evaluated by her assistant principal; and the assistant superintendent, who made three classroom observations, gave her notice of eight areas of deficiency and subsequently observed her classroom twice. The board gave her notice of its resolution to terminate her con-

tract, granted a public hearing, and fired her. In the court's view, 17 years of teaching in that district went down the drain in eight weeks. The Minnesota Supreme Court dissected the charges in light of the evidence and ordered the board to reinstate the teacher because of the lack of reasonable time to improve.[47]

One suit specifically raised the issue of what weight can be given to public complaints supported by teachers versus evaluation by a county superintendent. The West Virginia Supreme Court ruled in favor of a principal whose competency was challenged by two citizens. The charge was supported by several teachers. The county superintendent testified on behalf of the principal; but the board, after the hearing, voted to terminate his contract. The state superintendent ordered reinstatement, but the circuit court affirmed the board's action. In its analysis of the evidence, the supreme court emphasized the right to professional evaluation by supervisors. The county superintendent's evaluation outweighed the citizen's complaints. The court also held that under the accountability sections of the state constitution, citizen complaints could result in the dismissal of public employees based on a competent evaluation. The court concluded that "a county board of education may receive complaints against any school employee from citizens and that the board should act upon these complaints, order an evaluation, and discharge an employee if an improvement period proves to be in vain."[48] The process sounds reasonable; nonetheless, unless administrators can withstand political heat in making professional judgments about subordinates' performance, expensive judicial review will be the last resort.

Evaluator Performance. The professional evaluator who is derelict in duty, spiteful, or simply inept risks exposure in a judicial review. Such was the fate of one apparently threatened superintendent who wanted to rid the district of a new, but well-experienced, principal. The superintendent's chatty, ungrammatical, somewhat peevish letter of evaluation asking for resignation upon threat of recommending dismissal is reproduced in its entirety, misspellings and all, in an appellate court decision. However, more important to the outcome of this case was the board's failure to adopt a written policy establishing evaluative criteria for principals. The court noted:

> In the absence of established evaluative criteria, the principal serves at the whim and pleasure of the superintendent. The principal has no guidelines against which to measure his or her performance and may thereby be deprived of a legitimate opportunity for improvement. Without knowledge of the criteria to be employed in a discharge or nonrenewal hearing, the principal is further handicapped in his or her ability to dispute the propriety of the termination decision. This was not the intent of the legislature. Futhermore, established evaluative criteria and prior evaluations are important for purposes of judicial review.[49]

The court ordered reinstatement of the principal. The record is silent on the superintendent's fate.

Administration of Evaluations. How often should supervisors evaluate subordinates? Statutes may set the minimum frequency,[50] board policy may demand greater diligence,[51] and good administrative practice may require even greater effort. One court observed that the state policy required evaluations to be "regular" and reasoned that "to be effective, [evaluations] must be more frequent than annual."[52] Recent case law suggests that effective administrators identify deficiencies through regular evaluations, conduct numerous observations and consultations during a suitable remediation period, and further evaluate the employee at the end of the period to determine whether other action is appropriate.

From a due process perspective, the regularity of evaluations must at least meet statutory or policy standards. The quality and frequency of observations during a remediation period are evidence of good faith administration of evaluation laws. If contract termination is deemed necessary, the board should rely solely on post-remediation period evaluations to support a finding that cause for dismissal or demotion exists.[53]

Remediability. Fairness to both students and educators raises the issue of whether an employee's personal behavior or professional performance, when determined to be unacceptable, is remediable. If not, the board can take immediate action, subject to procedural requirements. If the behavior or performance is remediable, the board must give the employee reasonable time to correct the deficiency and the administration must offer help in the improvement process. What is reasonable will vary, depending on the total circumstances of each case.

Judging behavior to be irremediable risks judicial disagreement. Citing numerous cases, an Illinois appellate court explored several definitions. The court explained that "[w]hether causes for dismissal are remediable is a question of fact and its initial determination lies within the discretion of the board."[54] It continued: "A cause is irremediable when irreparable damage has already been done and cannot be remedied. . . . Causes, remediable when considered alone, will be deemed irremediable where combined with other remediable causes if continued over a long period of time during which the teacher refuses or fails to remedy them."[55] In this case involving a physical education teacher, the court considered the pattern of evaluations, the teacher's attitude, and the long period between the last evaluation in October and the filing of charges in May, and ruled for the teacher with this rationale:

> We believe that the causes charged against plaintiff were remediable in nature because the Board failed to establish either that the plaintiff's causes severely damaged the students, faculty or school or persisted for a suffi-

cient time period so that they could not have been corrected if a warning had been given.[36]

In another Illinois case a board dismissed a black teacher with 25 years of service who failed to improve her classroom organization, teaching techniques, and student discipline within 64 school days after notice of deficiency. Despite multiple observations and suggestions by specialists and supervisors, her attempts to change were ineffective. The court concluded that the teacher's

> [D]eficiencies were fundamental and of long standing, having to do with her own mental discipline and her lack of grasp of her subjects. . . . Moreover, her defensive attitude — founded on her belief that some of the criticism against her was racially motivated — created an atmosphere which definitely worked against remediation since she was thereby led to assign the criticism to outside influences she could not control.[37]

The attitude of the employee toward the supervisor's criticisms and suggestions for remediation are an important factor in judges' opinions about the remediability of deficiencies.[38]

Another school board, prodded by complaints from parents, discharged without warning an elementary teacher with nearly 20 years of experience. The board's decision was based on the teacher's alleged cruelty to students and unlawful corporal punishment, which the board concluded was irremediable. The teacher had used physical force in directing children to their seats or directing them in the hall. The board relied on the precedent of four corporal punishment cases in which irremediable behavior justified peremptory discharge. The court disagreed and ordered reinstatement of the teacher. The court distinguished this teacher's acts from those in the four cases cited by the board in which the charges were, respectively, striking students on the face and head, using a cattle prod to shock students, paddling a student twice in 20 minutes, and striking students with five pieces of balsa wood taped to a curtain rod. The court held that the board failed to "demonstrate the damage to the students, faculty or school was so severe that it could not have been corrected."[39]

Considered as a whole, the cases cited so far suggest that to be fair the length of time a board must give an employee to correct deficiencies varies with the remediability of the behavior, the attitude of the teacher, the damage to students and the school system, the clarity and specificity of charges, timely notice, and what reasonably can be expected of an employee. The attitude and helpfulness of the administration and board also weigh in the determination. The courts may count the number of school days given to the employee for correcting the deficiency, but what happens before, during, and after that period seems to determine whether the time allotted is deemed fair.

Methods of Evaluation. One aspect of evaluation not challenged in these cases is the instrument used. Some states (e.g., West Virginia, Pennsylvania, and Louisiana) require use of particular rating instruments developed at the state level. Other states require local boards to develop an evaluation program. Generally, the professional staff develops the evaluation instrument. Regardless of the instrument used, the courts comment approvingly when supervisory observations are documented by written anecdotal comments and buttressed by additional observations by other competent evaluators.

Judges look at the record as a whole. They look at the pattern of evaluation to determine whether the ratings and conferences warn employees of unacceptable performance and explain what is unacceptable. They take a very dim view of surprises. This is illustrated by the court's reaction to the dismissal of a teacher charged with lack of student control and objectionable body odor. The principal's early evaluations were complimentary but recommended clamping down on talkative students. No criticisms appeared in the second and third evaluations. All these observations occurred in the fall of 1976. In January 1977 the principal compiled a "Teacher Appraisal Instrument" and rated the teacher "plus" on 36 of 37 items. The one minus concerned body odor. Six more observations between October 1977 and February 1978 all praised the teacher. In April 1978 the school board entered a tenure contract with the teacher for 1978-79. A November 1978 rating was all complimentary. The December rating suggested that students sharpen their pencils before class. On 31 January 1979 the principal asked for the teacher's resignation. Predictably, the court reversed the board's termination of the teacher's contract.[60]

In summary, good administration requires establishment of criteria, attentive implementation of evaluation procedures, documentation of observations, and candid communication with employees. Consider the case of a teacher with two good annual evaluations and one critical one, which led to nonrenewal of her contract. Asked why his early evaluations were not critical, the principal testified:

> Well, the first year most beginning teachers have difficulties of some sort or another. They like to be popular and that gets them into trouble real fast and also Mrs. Wilt was pregnant the first year which I think contributed to part of her problem and trying to be a halfway decent, humane person, I did not want to wipe her out totally the first year or second year.[61]

The court's response is a message for all evaluators:

> For an evaluation to properly inform the school employee about his or her job performance, it must be as accurate and truthful as the evaluator can make it. Otherwise a teacher or school employee will not know how his

or her job performance is actually viewed by the administrator and also will not know how he or she can improve.

We find this statement by Greenfield to be disturbing because it indicates that the evaluations of the appellant for the first two years may not have been done openly and honestly, as required by [regulation]. These evaluations and observations are very subjective in nature because the areas intended to be measured cannot be objectively quantified. If these evaluations and observations were simply paperwork cranked out to feed the hungry bureaucrat, then we would not have spent so much time discussing them in this opinion. However, as evidenced by the facts of this case, a person's very livelihood can depend on where the evaluator places his checkmark on the form.

We would hope that in future cases, administrators, supervisors and principals will fully realize the importance of observations and evaluations and understand the significance of [the regulation] in this regard.[62]

Recommendations

The message of the evaluation statutes and case law is simple: Within the framework of the law, set standards, develop a regular process, and be fair. Practicing the last principle is hard because we all look at a decision from different perspectives. Being fundamentally fair, however, can take much of the sting out of adverse, but sometimes necessary, decisions.

More specifically, the lessons of the case law reviewed in this chapter can be condensed into the following guidelines:

1. Establish specific written criteria for the selection and evaluation of certificated personnel.
2. Use trained supervisory personnel to conduct evaluations.
3. Evaluate all certificated personnel regularly. To be effective, "regular" must be more often than annual.
4. If a particular instrument is prescribed by law, regulation, or policy, be careful that making the requisite judgments is not perfunctory. Supplement the instrument with anecdotal information.
5. Discuss openly and candidly with the person being evaluated all aspects of the evaluation and make specific recommendations for improvement as needed.
6. If the deficiencies in the educator's performance are so serious that failure to change could lead to demotion, nonrenewal of contract, or dismissal, give the person a written explanation to that effect, counsel him or her, and set a reasonable timetable for future observations and a reasonable deadline for correcting the deficiency. What is reasonable varies with the danger to students and staff, how long the behavior has been tolerated, how difficult change will be, and the employee's attitude.

7. Rely primarily on evaluations made after the period of remediation to determine whether demotion, reassignment, nonrenewal of contract, or dismissal is appropriate.
8. Listen to complaints from parents, but rely on the opinions of qualified evaluators if there is disagreement.
9. Observe all the relevant procedural and substantive requirements set forth in statutes, regulations, board policies, and collective bargaining agreements when making an employment decision that is adverse to the employee.
10. Move with deliberate speed and without surprises to balance consideration for the employee, the welfare of the students, and the progress of the educational system.

Footnotes

1. Cal. Const. art. 9 § 2. The constitution establishes the system.
2. Arval Morris, *The Constitution and American Education* (2nd ed.) (Racine, Wisc.: West Publishing Co., 1980), p. 620.
3. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 403 N.E.2d 277, 279 (Ill. 1980).
4. Fla. Stat. Ann. § 231.29 (West 1982). For a list and discussion of such state statutes, *see* Joseph Beckham, *Legal Aspects of Teacher Evaluation* (Topeka, Kans.: National Organization on Legal Problems of Education, 1981), apps. B, C.
5. Cal. Educ. Code § 44660 (West 1978).
6. Iowa Code Ann. § 279.14 (West Supp. 1982).
7. Kan. Stat. Ann. §§ 72-9001 – 9006 (1976). The 1982 amendment, *inter alia*, repealed the legislative intent section, *id.*, §§ 72-9002 – 9006 (1982).
8. *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-537(B) (West 1982); Cal. Educ. Code § 44660 (West 1978); Okla. Stat. Ann. tit. 70, § 6-102.1 (West 1982).
9. Alaska Admin. Code tit. 4, § 19.020 (1975).
10. Cal. Educ. Code § 44662 (West 1978).
11. *See, e.g.*, Cal. Educ. Code § 44661 (West 1978) (advice of district's certificated personnel); Fla. Stat. Ann. § 231.29 (West Supp. 1983) (Florida Council on Educational Management); Nev. Rev. Stat. § 391.3125 (1979) (elected representatives of teacher personnel).
12. La. Rev. Stat. Ann. § 391.3 (West 1982).
13. Wash. Rev. Code Ann. § 28A.67.065 (West 1982).
14. *See, e.g.*, Conn. Gen. Stat. § 10-151b (West Supp. 1983).
15. *See, e.g.*, Okla. Stat. Ann. tit. 70, 6-102.2 (West 1982).
16. *See, e.g.*, W. Va. Ann. Code § 18A-2-9 (Supp. 1983).
17. *See, e.g.*, Trimboli v. Board of Educ. of Wayne Cty., 280 S.E.2d 686 (W. Va. 1981). The board failed to follow the administrative regulations of the state board of education so the state supreme court ordered reinstatement of a transferred employee.
18. *See, e.g.*, Ariz. Rev. Stat. Ann § 15-537(D) (West 1982); Kan. Stat. Ann. § 72-9003(d) (1982).

19. *See, e.g.*, 4 Alaska Admin. Code § 19.030 (1975).
20. *See, e.g.*, Conn. Gen. Stat. § 10-151b(a) (West Supp. 1983).
21. *See, e.g.*, 4 Alaska Admin. Code § 19.040 (1975): "Unless mutually agreed otherwise by both the person evaluated and the school board (or its designee), no portion of an evaluation may be made public, except as evidence in a proceeding relative to an evaluated person's certification or employment, or as otherwise allowed or required by a court of law."
22. Briggs v. Board of Dir. of Hinton Commun. School Dist., 282 N.W.2d 740, 743 (Iowa 1979).
23. U.S. Const. amend. XIV, § 1.
24. *See, e.g.*, Wilt v. Flanigan, 294 S.E.2d 189 (W.Va. 1982) (no "open and honest" evaluation as required by administrative regulation); Cantrell v. Vickers, 495 F. Supp. 195 (N.D. Miss. 1980) (hearing not "impartial" because board decision previously made); Orth v. Phoenix High School System No. 210, 613 P.2d 311 (Ariz. App. 1980) (written "reminder" not sufficient preliminary notice of inadequacy).
25. *Cal-Tax Research Bulletin* (November 1981): 3, 4.
26. *See, e.g.*, Wesclin Educ. Ass'n v. Board of Educ., 331 N.E.2d 335 (Ill. App. 1975).
27. *See, e.g.*, Fries v. Wessington School Dist. No. 2-4, 307 N.W.2d 675 (S.D. 1981).
28. *Id.* at 679.
29. Derrickson v. Board of Educ. of the City of St. Louis, 537 F. Supp. 338, 342-43 (E.D. Mo. 1982).
30. *Id.* at 343.
31. *See, e.g.*, Anderson v. San Mateo Commun. College Dist., 151 Cal. Rptr. 111 (Cal. App. 1978).
32. W. Va. Board of Educ. Policy No. 5300(6)(a).
33. Wilt v. Flanigan, 294 S.E.2d 189 (W. Va. 1982).
34. Siglin v. Kayenta Unified School Dist., 655 P.2d 353 (Ariz. App. 1982).
35. D.C. Code § 31-102 (1973), repealed 25 D.C. Reg. 6055 (1978).
36. District of Columbia v. White, 435 A.2d 1055 (D.C. 1981).
37. Jones v. Jefferson Parish School Bd., 533 F. Supp. 816 (E.D. La. 1982).
38. Lee v. Conecuh Cty. Bd. of Educ., 634 F.2d 959, 963 (5th Cir. 1981).
39. *Id.* at 964.
40. Kudasik v. Board of Dir., Port Allegheny School Dist., 455 A.2d 261, 263 (Pa. Commw. 1983).
41. *Id.* at 264.
42. *See, e.g.*, Fla. Stat. Ann. tit. 15, § 231.36(3)(a)3 (West Supp. 1983); Mass. Ann. Laws ch. 71, § 42 (Michie/Law. Coop. 1978); N.Y. Educ. art. 61 § 3012 (Consol. 1979).
43. Trimboli v. Board of Educ. of Cty. of Wayne, 254 S.E.2d 561 (W. Va. 1979).
44. Trimboli v. Board of Educ. of Wayne Cty., 280 S.E.2d 686, 688 (W.Va. 1981), quoting Rogers v. Board of Educ., 25 S.E.2d 537, 542 (W. Va. 1943).
45. Munger v. Jesup Commun. School Dist., 325 N.W.2d 377, 380 (Iowa 1982).

46. Cantrell v. Vickers, 495 F. Supp. 195 (N.D. Miss. 1980).
47. Ganyo v. Independent School Dist. No. 832, 311 N.W.2d 497 (Minn. 1981).
48. Mason City Bd. of Educ., 274 S.E.2d 435, 439 (W.Va. 1981.)
49. Hyde v. Wellpinit School Dist. No. 49, 611 P.2d 1388, 1391 (Wash. App. 1980).
50. *See, e.g.*, Fla. Stat. Ann. § 231.29(a) (West 1982) (each employee at least once a year).
51. Childers v. Independent School Dist. No. 1 of Bryan Cty., 645 P.2d 992, 995 (Okla. 1982) (statute required evaluation of tenured personnel every three years; board policy required evaluation of all teachers twice a year).
52. Lipan v. Board of Educ., 295 S.E.2d 44, 45 (W.Va. 1982).
53. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 403 N.E.2d 277, 281 (Ill. 1980).
54. Morris v. Board of Educ. of the City of Chicago, 421 N.E.2d 387, 392 (Ill. App. 1981).
55. *Id.*
56. *Id.* at 393.
57. Community Unit School Dist. No. 60 v. Maulin, 435 N.E.2d 845, 851 (Ill. App. 1982).
58. *See* discussions of the evidence in Munger v. Jesup Commun. School Dist., 325 N.W.2d 377 (Iowa 1982); Siglin v. Kayenta Unified School Dist., 655 P.2d 353 (Ariz. App. 1982); and Board of Dir. of the Sioux City Commun. School Dist. v. Mroz, 295 N.W.2d 447, 449 (Iowa 1980).
59. Board of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 445 N.E.2d 832, 837 (Ill. App. 1983); *accord*, Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981).
60. Hollingsworth v. Board of Educ. of School Dist. of Alliance, 303 N.W.2d 306 (Neb. 1981).
61. Wilt v. Flanigan, 294 S.E.2d 189, 194 n.5 (W.Va. 1982).
62. *Id.*
63. *Id.*